Supreme Court, U.S.
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No. 01-1541

IN THE

Supreme Court of the United States

SAGE REALTY CORPORATION, THE WILLIAM KAUFMAN ORGANIZATION, LTD., 4 THIRD AVENUE FEE LLC, WATER STREET FEE LLC, 7 THIRD AVENUE FEE LLC, MADISON AVENUE FEE LLC, MADISON AVENUE LEASEHOLD LLC, 7 THIRD AVENUE LEASEHOLD LLC, 4 THIRD AVENUE LEASEHOLD LLC, WATER STREET LEASEHOLD LLC, MELVYN KAUFMAN and ROBERT KAUFMAN,

Petitioners,

—v.—

PROSKAUER ROSE LLP and NOMURA SECURITIES INTERNATIONAL, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION—FIRST DEPARTMENT

BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

Pursuant to Rule 29.6, the parent corporation of Nomura Securities International, Inc. is Nomura Holding America, Inc. No publicly traded entity owns more than 10% of the shares of Nomura Securities International, Inc.

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JURISDICTION

This Court lacks jurisdiction under 28 U.S.C. § 1257(a) on the ground that the courts below did not consider the "validity of a statute of any State . . . on the ground of its being repugnant to the Constitution, treaties, or laws of the United States," and because no claim of any "title, right, privilege, or immunity . . . under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States" was raised at any time.

STATEMENT OF THE CASE

This action arises from the successful refinancing of certain of Petitioners' commercial properties located in New York City. Proskauer Rose LLP ("Proskauer") represented Petitioners in connection with those transactions. Nomura Asset Capital Corporation, an affiliate of Respondent Nomura Securities International, Inc. ("NSI"), loaned approximately $174 million to certain of the Petitioners in exchange for mortgages on Petitioners' properties. NSI then securitized those mortgages by pooling them with other commercial mortgages and selling interests in the pool to the public. In connection with the securitization transaction, NSI entered into an Investment Banking Engagement Letter with Petitioners Melvyn and Robert Kaufman, pursuant to which NSI agreed to provide "financial advisory services . . . in connection with the structuring of the securitization." Following the successful consummation of the transactions, Petitioners sued Proskauer for malpractice and NSI for breach of the Investment Banking Engagement Letter.

As the opinions below describe (App. at 2a-8a and 12a-16a), this action was dismissed because Petitioner Melvyn Kaufman ("Kaufman") deliberately destroyed relevant discovery materials. Petitioners' brief obfuscates,

disguises, or simply ignores the true facts of Kaufman's destruction of evidence. The Decision of the Supreme Court of the State of New York, County of New York (the "Trial Court") presents the salient facts relating to Petitioners' destruction of evidence. Based on a record that consisted of almost 4,000 pages of exhibits together with 15 cassette recordings, videotapes of the depositions of two key witnesses, including Kaufman, and excerpts from the transcripts of the depositions eleven other witnesses, the Trial Court exercised its discretion pursuant to governing New York law, and determined that "there has been a willful and bad faith destruction of discovery material that ought to have been disclosed." (App. at 16a.) Accordingly, the Trial Court dismissed all of Petitioners' claims against NSI and all of Petitioners' claims against Proskauer (except an alleged conflict of interest claim, which was subsequently dismissed).

The Appellate Division, First Department (the "Appellate Division") unanimously affirmed, holding that the following facts were uncontroverted: (1) Petitioners taped important business conversations; (2) Petitioners admitted that the collateral and prepayment provisions of the loans at issue herein were crucial to them; (3) Petitioners directed that important calls relating to the loan transactions at issue were to be recorded; (4) Kaufman was observed discussing the transactions on the telephone; (5) as of the time this litigation commenced, Kaufman had hundreds of tapes in his office, including tapes relating to the transactions; (6) Kaufman admitted that he destroyed tapes relating to the transactions; and (7) Kaufman admitted discarding tapes within a day after producing others to his counsel. (App. at 5a-7a.)

Significantly, Petitioners fail to tell this Court that the Trial Court found, and the Appellate Division affirmed, that Kaufman secretly destroyed approximately 20 relevant

cassette tapes when their disclosure became imminent by taking them home to his apartment and throwing them down the trash chute where, as he conceded, "nobody sees anything," and then engaged in "blatant" "dodging and weaving" to forestall discovery of his wrongdoing. (App. at 14a; see also App. at 5a, 7a). For the full facts relating to Petitioners' destruction of discovery materials herein, NSI respectfully refers the Court to the decisions of the Appellate Division (App. at 1a-11a) and the Trial Court (App. at 12a-20a).

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Question Presented was Neither Raised in Nor Decided by the Courts Below

Petitioners claim that their Fourteenth Amendment due process rights entitled them to an evidentiary hearing to determine whether destruction of evidence had occurred. Rule 14.1(g)(i) of the Court states in pertinent part that when, as here, certiorari is sought from a judgment or order of a state court, the petition shall contain

> specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (*e.g.*, court opinion, ruling on exception, portion of court's charge and exception thereto, assignment of error), so as to show that the federal question was timely

and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari.

Petitioners fail to comply with this rule because they cannot. The opinions below never considered, let alone decided, any claim that Petitioners were denied their Fourteenth Amendment rights because Petitioners never made such a claim, either in the Trial Court or on appeal to the Appellate Division.[1] Although Petitioners claim that the Trial Court refused to hold an evidentiary hearing at oral argument on Respondents' motion to dismiss the complaint for destruction of evidence (Pet. at 6), the transcript of that argument reveals that Petitioners did not request a hearing at any time. Nor did they claim at any time that their due process rights had been violated. (See N.Y.R. at AR 3716-97.)

"The Court will not decide federal constitutional issues raised here for the first time on review of state court decisions." Cardinale v. Louisiana, 394 U.S. 437, 438 (1969); see also Webb v. Webb, 451 U.S. 493, 496-97 (1981) (noting that "jurisdiction of this Court to reexamine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system"

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[1] Petitioners first raised a due process claim only when they sought discretionary review from the New York Court of Appeals. That court denied their motion for review. Where discretionary review is denied by the court of last resort, the order of the intermediate court is the decision from which review must be sought. 28 U.S.C. § 1257; Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 160 (1954). In any event, Petitioners were not entitled to raise any due process claims with the Court of Appeals because they failed to raise that issue in the courts below. Melahn v. Hearn, 60 N.Y.2d 944, 945, 471 N.Y.S.2d 47, 48 (1983) (holding that constitutional issues not raised below were not preserved for review).

and dismissing writ for want of jurisdiction where lower courts had never considered the question presented) (citations omitted). As the Cardinale Court observed, "there are sound reasons for this. Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind." 394 U.S. at 439. Here, the Trial Court and the Appellate Division never considered Petitioners' Fourteenth Amendment rights because Petitioners never claimed any such rights. Accordingly, the Court is without jurisdiction, and the petition should be denied.

II. There is No Conflict of Authority Concerning Petitioners' Claimed Due Process Rights

Even if Petitioners had properly invoked the jurisdiction of the Court, there would be no reason to grant certiorari because the purported "split" of authority upon which Petitioners ground their request (Pet. at 16-20) does not exist. Petitioners claim that "there is a well-developed conflict among the circuit courts of appeals and the state courts of last resort as to whether due process requires that an evidentiary hearing be conducted where disputed factual issues are raised on a motion to dismiss due to alleged spoliation." (Pet. at 16.) They then cite 27 decisions that purportedly illustrate that "split." (Pet. at 17-18.)

Not a single one of those decisions considers whether "due process requires that an evidentiary hearing be conducted." Rather, the decisions illustrate the oft-cited, consistently applied principle that lower courts should be afforded wide discretion to handle the myriad issues that may arise in connection with discovery. See Cruden v. Bank of N.Y., 957 F.2d 961, 972 (2d Cir. 1992) (district court enjoys wide discretion in handling of pre-trial discovery); Souza v. Fred Carries Contracts, Inc., 191 Ariz. 247, 250, 955 P.2d 3, 6 (1997) ("[a]dopting inflexible 'bright line' rules in this

area, in our view, would be ill-advised. Rather, issues concerning the destruction of evidence and appropriate sanctions therefor should be decided on a case-by-case basis, considering all relevant factors"); Lipin v. Bender, 84 N.Y.2d 562, 571, 620 N.Y.S.2d 744, 747 (1994) (affirming dismissal of complaint and noting that "[s]pelling out the remedies for the limitless potential discovery abuses would not only overwhelm the statute [governing remedies for discovery violations] but also needlessly confine the discretion of courts to tailor the remedy to the problem").

Petitioners' contention that there is a conflict of authority regarding when an "adverse inference" should apply (Pet. at 21-23) is similarly infirm. Although Petitioners cite numerous decisions purporting to illustrate that "split," not a single one considers the "due process implications" (Pet. at 23) upon which Petitioners necessarily rest their claim that their due process rights were violated.[2]

Because the decisions Petitioners cite do not consider any due process right to a hearing, or any due process "implications" of the adverse inference, there is no "well-developed conflict" for the Court to resolve. Accordingly, the petition should be denied.

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[2] Nor have Petitioners properly raised this issue. Their own question presented is confined solely to the issue of whether the Fourteenth Amendment requires an *evidentiary hearing*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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